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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1197

NOLAN CARTER, JR., Trustee in Bankruptcy, - - - - - - - Petitioner,

versus

COMMERCIAL BANK OF MIDDLESBORO, KENTUCKY, - - - - - - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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INDEX.

	PAGE
Reports (Opinion Not Published)	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement of Case	2– 5
Reasons for Granting Writ	5– 8
I. The decision below conflicts in principal with the decision in the First Circuit Court of Appeals as to the proper application of Article 9-204(5) of the Uniform Commercial Code	5– 6
II. Overall National Importance of Issue	6– 8
Appendix A—Opinion and Judgment of Court of Appeals	9–17
Appendix B—Order of Referee in Bankruptcy	18–19

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COMMERCIAL BANK OF MIDDLESBORO, KENTUCKY, - - - - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The Petitioner, Nolan Carter, Jr., Trustee in Bankruptcy, of the bankrupt estate of Cantrill Construction Company, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 24, 1969.

OPINION BELOW.

The Opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The Opinion of the District Court for the Eastern District of Kentucky is reported in 293 F. Supp. 129. The Opinion of the Referee in Bankruptcy appears in Appendix B.

JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 24, 1969, and this Petition for Certiorari was filed within 90 days of that date. This Court's Jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether a Security Agreement expires by operation of law, when an original note, for which it was given to secure the repayment of, is cancelled, and a new note is taken, providing for an increased rate of interest.

STATUTE INVOLVED.

The Statute involved is Kentucky Revised Statute 355.9-204(5):

> "(5) Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment."

STATEMENT OF THE CASE.

On February 10, 1967, Cantrill Construction Company, Inc. (Cantrill), executed and delivered a note to Commercial Bank of Middlesboro, Kentucky (Commercial) in the amount of $30,310.00, payable within six months with interest thereon at the rate of six per cent per annum. On the same day, in order to secure

the repayment of the loan, Cantrill executed and delivered to Commercial a security agreement covering certain construction equipment. It provided in part, as follows:

> "Witnesseth: Whereas the Mortgagor is indebted to the Mortgagee in the sum of thirty thousand, three hundred ten dollars and no cents ($30,310.00), as evidenced by Mortgagor's promissory note of even date herewith, payable to Mortgagee within six (6) months after date.
>
> "Now, therefore, to secure the payment of the said indebtedness as evidenced by the aforesaid note, together with six per cent (6%) interest per annum thereon from the various maturity dates of payment provided in said note. . . ."

The security agreement made no provision for future advances, extensions or renewals of the obligation. At the end of the six (6) month period, Cantrill was unable to repay the loan. The original note was cancelled, in one form or another, a payment made on same reducing the indebtedness to $20,202.00; a new note was taken for the $20,202.00, payable in six (6) months, with interest at the rate of 7% per annum. On the new note the following words were typed upon its face, in the lower left-hand corner:

> Age 60:
> Coll on Back
> Renewal #1 Orig. Amt. 30,310. Orig date 2-10-'67.

On the reverse side on the new note was typed the following:

Collateral:

Rock Quarry Equipment
Aug. 10, 67 2275 7-20, 202.00
Jan. 29, 1968—1 P. M.

At the time the original note and security agreement were executed, Cantrill also executed and delivered a Financing Statement to the Bank covering certain construction equipment. The Financing Statement was properly recorded.

When the second note for $20,202.00 became due, Cantrill could not pay and shortly thereafter went into Bankruptcy.

The Commercial Bank of Middlesboro filed a Petition to Reclaim the collateral, alleging its security interest in the same. The Trustee objected upon the basis that the Bank's security lapsed by operation of law when the original note was cancelled, and the new note was taken. The Referee overruled the Petition for Reclamation of Commercial, and Commercial filed a Petition for Review of the Referee's Order in the United States District Court for the Eastern District of Kentucky. The District Court affirmed the Referee, stating in essence, that the security agreement showed on its face that it was given to secure the repayment of a note in the sum of $30,310.00 payable in six months, and as it did not purport to secure payment of any extensions or renewals of the note, it expired by operation of law. The District Court citing Safe Deposit Bank and Trust Co. v. Berman, 1st Cir. C. A. 393 F. 2d 401.

The Commercial Bank then appealed to the United States Circuit Court of Appeals for the Sixth Circuit. The Sixth Circuit reversed the decision of the United States District Court and stated in essence that the Berman case was inapposite, and that it was not necessary for the security agreement to provide for an extension or renewal of the indebtedness.

REASONS FOR GRANTING WRIT.

1. The Decision Below Conflicts in Principal With the Decision in the First Circuit Court of Appeals as to the Proper Application of Article 9-204(5) of the Uniform Commercial Code.

KRS 355-9-204(5) provides that "Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment."

A thorough research of all Code decisions reveals only one case similar to the one at bar, as having been decided and reported. In the case of Safe Deposit Bank and Trust Co. v. Berman, 393 F. 2d 401 (1968), the First Circuit established the rule of law, that under Section 9-204(5), a security agreement, which is limited to a specific note, may not be extended to subsequent notes by incorporation by reference in the subsequent notes.

The Sixth Circuit avoided Berman, by stating it was inapposite, because there had been additional loans made in Berman, and not in Cantrill. Granted, but, this has nothing to do with the application of the

principal laid down in Berman. Berman involved a "future advance." This case involves "other value." The same principal of law must apply to both situations.

In light of Berman, and the principal of law therein established, it is not possible to reconcile the two cases.

2. Overall National Importance of Issue.

This case involves one of the most important sections of Article 9, of the Uniform Commercial Code. The Code has now been adopted by forty-nine of our fifty States. It is now the Law of the Land insofar as commercial transactions are concerned.

Each day hundreds of millions of dollars are loaned by the various different financial institutions throughout the United States. This includes every one from the small rural banks to the United States Government, and its Agencies, such as the Small Business Administration. In order to secure their loans, these institutions take back security agreements covering certain described collateral. This case raises the question of what is required, if anything, in a security agreement, for the secured party to remain secured when a debt matures and the debtor cannot pay, and a new note is taken.

The Sixth Circuit held in essence, that even when a new note is taken, with an increase in interest, this does not create a new obligation, and as such is not "other value." The Sixth Circuit also held that security agreements did not need to provide for extensions or renewals of pre-existing obligations, and

that a security agreement, limited to the note it is given to secure the repayment of, may be extended to subsequent notes by incorporation by reference in the subsequent notes. This case simply asks—what is "other value," and if Berman is correct . . ., and the Sixth Circuit was correct, then how does one advise a client on how he is to secure his loans against future defaults, or renewals or extensions. If value is to be given its traditional meaning, then it should be anything given or received which is sufficient consideration to support a simple contract. The granting of additional time to repay a debt in exchange for a 1% increase in interest is prima facie valuable consideration—the giving of values. . . . But not so according to this case. The Referee in Bankruptcy and the United States District Court for the Eastern District both relied upon Berman in reaching their opinion. The Sixth Circuit said it was inapposite. This, within itself, indicates a high degree of doubt, or confusion as to just what is meant by "other value," and how it is to be interpreted. In view of the importance of this Section of the Code and its effect upon the many hundreds of millions of dollars outstanding on loans, and future loans, the issue should be clarified.

Finally, the correctness of the Decision below is open to serious question. The Code represents an entirely new approach to security transactions and the rule of construction should be adopted that the Code is plenary and exclusive except where the Legislature has clearly indicated otherwise, and quite frankly, I feel the Sixth Circuit has failed to do this.

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Sixth Circuit.

Respectfully submitted,

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